

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

NATHANIEL JOHNSON,
#927305

Plaintiff,

vs.

CHERYL, *et al.*,

Defendants.

2:11-cv-00291-JCM (CWH)

ORDER

Presently before the court is defendants', Melody Molinora and Raymund Mondora, motion to dismiss. (Doc. # 140). Plaintiff filed a response in opposition (doc. # 148), and defendants filed a reply (doc. # 151).

Also before the court is defendant Michael See's motion for attorney fees. (Doc. # 145). Plaintiff filed a response in opposition (doc. # 152), and defendant See filed a reply (doc. # 154).

22 Also before the court is plaintiff's third motion to amend/correct the complaint. (Doc. # 147).
23 Defendants Molinora, Mondora, and See filed a response in opposition (doc. # 153), and plaintiff filed
24 a reply (doc. # 155).

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1 **I. Background**

2 A brief factual background and procedural background are necessary to resolve the pending
3 motion.

4 *A. Factual Background*

5 Plaintiff, who was previously incarcerated at Clark County Detention Center (“CCDC”), alleges
6 that on December 24, 2010, he was arrested and brought to CCDC, wherein he failed to receive
7 necessary medical treatment in violation of his constitutional rights. Specifically, plaintiff alleges that
8 he arrived to CCDC with a pre-existing injury to his pinky finger. The finger had been dislocated as a
9 result of a fight plaintiff was involved in approximately two weeks to two months prior to his arrest.

10 Plaintiff further alleges that he informed both defendant Molinora (a treating nurse) and Mondora
11 (a treating doctor) about the condition of his pinky finger. According to plaintiff, Molinora and Mondora
12 either ignored or purposefully prevented plaintiff from receiving treatment, including surgery, on his
13 pinky.

14 *B. Procedural Background*

15 Plaintiff filed his complaint pro se and in forma pauperis on February 22, 2011. On April 22,
16 2011, this court conducted a screening pursuant to 28 U.S.C. § 1915 and permitted certain claims to
17 proceed forward.

18 Since that date, plaintiff acting pro se and while in prison, has struggled to successfully prosecute
19 this case. Many of the defendants have been dismissed at either the motion to dismiss or summary
20 judgment stage. The court has permitted plaintiff to amend his complaint twice, and plaintiff has further
21 struggled to serve all of the defendants.

22 In January 2013, plaintiff was released from prison. He moved to Reno, Nevada. Upon moving
23 to Reno, plaintiff has hired an attorney to prosecute his case. Counsel for plaintiff appeared, and, for
24 the first time, counsel has filed motions and oppositions to motions on plaintiff’s behalf. Counsel has
25 provided much needed clarification.

1 **II. Amend/Dismiss**

2 Shortly after plaintiff hired counsel, defendants Molinora and Mondora filed their motion to
 3 dismiss. Plaintiff's counsel filed an opposition to the motion to dismiss contemporaneously with a
 4 motion to amend.

5 ***A. Legal Standard***

6 Fed. R. Civ. P. 15(a) provides that leave to amend "shall be freely given when justice so
 7 requires." The Supreme Court has interpreted Rule 15(a) and confirmed the liberal standard district
 8 courts must apply when granting such leave. In *Foman v. Davis*, 371 U.S. 178 (1962), the Court
 9 explained: "In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory
 10 motive on the part of the movant, repeated failure to cure deficiencies by amendments previously
 11 allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the
 12 amendment, etc.—the leave sought should, as the rules require, be 'freely given.'" *Id.* at 182.

13 However, a district court should deny a motion to amend where the amendment is an "exercise
 14 in futility." *Leadsinger, Inc. v. BMG Music Pub.*, 512 F.3d 522, 532 (9th Cir. 2008). "[A] proposed
 15 amendment is futile if no set of facts can be proved under the amendment that would constitute a valid
 16 claim or defense." *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988).

17 Under Rule 15C, "[a]n amendment to a pleading relates back to the date of the original pleading"
 18 in three circumstances. First, for all amendments, relation back is permitted if "the law that provides
 19 the applicable statute of limitations allows relation back." Fed. R. Civ. P. 15(c)(1)(A). Second, relation
 20 back is permitted if "the amendment asserts a claim or defense that arose out of the conduct, transaction,
 21 or occurrence set out—or attempted to be set out—in the original pleading." Fed. R. Civ. P. 15(c)(1)(B).

22
 23 For the third circumstance, the party seeking to amend its complaint must satisfy several
 24 showings. Relation back is permitted if "the amendment changes the party or the naming of the party
 25 against whom a claim is asserted if Rule 15(c)(1)(B) is satisfied and if, within the period provided by
 26 Rule 4(m) . . . , the party to be brought in by amendment: (I) received such notice of the action that it will

1 not be prejudiced on the merits; and (ii) knew or should have known that the action would have been
2 brought against it, but for a mistake concerning the proper party's identity." Fed. R. Civ. P. 15(c)(1)©;
3 *see generally Louisiana-Pacific Corp. v. ASARCO, Inc.*, 5 F.3d 431, 434 (9th Cir. 1993) (discussing
4 Rule 15(c)(1)© prior to the amended current version).

5 In addition to the Rule 15 requirements, the local rules of federal practice in the District of
6 Nevada require that a plaintiff submit a proposed, amended complaint along with a motion to amend.
7 LR 15-1(a).

8 **B. Discussion**

9 Both the parties and the court will benefit greatly from the fact that counsel now represents
10 plaintiff. In the motion to amend and response to the motion to dismiss, plaintiff's counsel provides
11 much needed clarification.

12 In the motion to amend, plaintiff's counsel concedes that certain claims, such as the Eighth
13 Amendment claims, could not survive a motion to dismiss. The new proposed complaint would go
14 forward with only the claims that could colorably survive a motion to dismiss.

15 The court finds that amendment should be permitted under Rule 15(c)(1)(B) because "the
16 amendment asserts a claim . . . that arose out of the conduct, transaction, or occurrence set out—or
17 attempted to be set out—in the original pleading." The court further finds that plaintiff should be given
18 this final opportunity to amend his complaint with the benefit of counsel.

19 The motion is granted and plaintiff shall have ten days from this order to file the amended
20 complaint attached as exhibit one to the motion to amend. The amended complaint moots defendants'
21 motion to dismiss without prejudice.

22 **III. Attorney Fees**

23 This court previously dismissed defendant Captain Michael See from the complaint. (See doc.
24 # 142). Defendant See now moves the court for attorney fees in a § 1983 case against a pro se and in
25 forma pauperis plaintiff.

26 . . .

1 A. *Legal Standard*

2 “In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable
3 attorneys’ fee from the loser.” *Alyeska Pipeline Co. v. Wilderness Soc’y.*, 421 U.S. 240, 247 (1975).
4 However, Congress has provided for the award of attorneys’ fees to the prevailing party in civil rights
5 action brought under § 1983. “Congress’ intent in enacting § 1988 was to attract competent counsel to
6 prosecute civil rights cases.” *Mendez v. Cnty. of San Bernardino*, 540 F.3d 1109, 1126 (9th Cir. 2008).
7 “In a civil rights case, fees may be awarded against an unsuccessful plaintiff only if his action is
8 meritless in the sense that it is groundless or without foundation.” *Mitchell v. Los Angeles Cnty. Coll.*
9 *Dist.*, 861 F.2d 198, 202 (9th Cir. 1988) (internal citations and quotations omitted).

10 B. *Discussion*

11 Defendant See argues that plaintiff’s claims must have been meritless because they did not
12 survive a motion to dismiss. Plaintiff argues that dismissal at the motion to dismiss stage does not
13 automatically render every claim or allegation in the complaint “meritless.”

14 The court agrees with plaintiff. Plaintiff’s complaint survived the screening order. Defendant
15 See was an employee at CCDC at when the events in question occurred. A court should grant fees
16 against a plaintiff in civil rights cases only in exceptional circumstances. This is not an exceptional
17 circumstance.

18 Losing at the motion to dismiss stage, especially after surviving a screening order, does not
19 automatically make the claims in the complaint “meritless.” *See Mitchell v. Office of Los Angeles Cnty.*
20 *Superintendent of Sch.*, 805 F.2d 844, 847 (9th Cir. 1986) (“There is a significant difference between
21 the bringing of cases with no foundation in law or facts at the outset and the failure to present evidence
22 sufficient to justify relief at trial.”).

23 Accordingly,

24 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that defendants’ motion to dismiss
25 (doc. # 140) be, and the same hereby, is DENIED without prejudice.

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1 IT IS FURTHER ORDERED that defendant's motion for attorneys' fees (doc. # 145) be, and
2 the same hereby, is DENIED.

3 IT IS FURTHER ORDERED that plaintiff's motion to amend/correct complaint (doc. # 147) be,
4 and the same hereby, is GRANTED. Plaintiff shall have ten days from this order to file the amended
5 complaint attached as exhibit 1 and serve the remaining defendants within the time allotted by Federal
6 Rule of Civil Procedure 4.

7 DATED July 29, 2013.

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10 UNITED STATES DISTRICT JUDGE
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